SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-524

WILLIAM THISTLETHWAITE,

Petitioner,

—v.—

THE CITY OF NEW YORK, THE PARKS, RECREATION AND CULTURAL AFFAIRS ADMINISTRATION, and AUGUST HECKSCHER and RICHARD M. CLURMAN, as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term, 1974

No. 74-

WILLIAM THISTLETHWAITE,

Petitioner,

v.

THE CITY OF NEW YORK, THE PARKS, RECREATION AND CULTURAL AFFAIRS ADMINISTRATION, and AUGUST HECKSCHER and RICHARD M. CLURMAN, as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner William Thistlethwaite respectfully prays that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the Second Circuit, rendered on May 13, 1974.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at 497 F.2d 339, and appears in the Appendix. The opinion of the District Court for the Southern District of New York is reported at 362 F. Supp. 88 and appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was made on May 13, 1974. A timely petition for rehearing in banc was denied on August 6, 1974, and this petition for a writ of certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Is it a bar to a federal civil rights action for prospective relief against provisions of a local ordinance upon the ground that they are unconstitutional on their face and as applied, if the plaintiff has been previously fined in the state courts for violating one of the said provisions and has defended and appealed his conviction on the ground that the provision

is unconstitutional on its face?

Statutory Provisions Involved

United States Code, Title 42, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Rules and Regulations of the New York City Parks, Recreation and Cultural Affairs Administration are not directly involved in this petition, but are set forth in the margin.

Statement of the Case

On June 27, 1970, Petitioner William Thistlethwaite was charged with violation of Section 13 of the Rules and Regulations of the New York City Parks, Recreation and

Cultural Affairs Administration[1] (hereinafter referred to as "Rules and Regulations) for having distributed within Central Park a political pamphlet advocating boycott of the movie "Woodstock Nation," alleged to be a "capitalist profanation" by a large American corporation. On April 17, 1971, Sol Lockshon, a plaintiff below but not a petitioner here, was charged with violation of Section 13 in connection with a distribution of leaflets on the southeast sidewalk at the intersection of Central Park West and 81st Street, in Manhattan. The leaflet announced a gathering of speakers to protest the Indochina conflict and specified a "March Against the War" to be held in Washington D.C. later that month.

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[1]Section 13 provides: "No person shall hold any meeting, perform any ceremony, make an address, exhibit or distribute any sign, placard, declaration or appeal of any description in any park or parkstreet, except by permit by Parks, Recreation and Cultural Affairs Administration. Upon application, the Administrator shall issue such permit unless: (1) the use for which the permit is sought would substantially interfere with park use and enjoyment by the public; (2) the location selected is not suitable because of special landscaping and planning; (3) the location is not suitable because it is a specialized area including, but not limited to, a zoo, swimming pool, or skating rink; (4) the date and time requested have previously been allotted by permit. Whenever a permit is denied, alternative suitable locations and dates shall be offered to the applicant."

Thistlethwaite and Lockson were not familiar with the relevant sections of the Rules and Regulations, and neither had attempted to secure the permit purportedly required thereunder. They were tried and convicted in consolidated proceedings before the Criminal Court of the City of New York on January 13, 1972 and were sentenced to a fine of $10.00 or two days in jail; they each paid the fine. In defense of this criminal prosecution, they moved to dismiss the case against them on the ground that Section 13 of the Rules and Regulations was an unconstitutional abridgment of their freedom of expression. This motion was denied without opinion.

Both appealed their convictions. By order dated November 17, 1972, the Appellate Term of the Supreme Court of the State of New York affirmed, without opinion, the judgment of the Criminal Court of the City of New York. An application for leave to appeal to the Court of Appeals of the State of New York was denied by certificate dated December 22, 1972.

Thistlethwaite and Lockshon then commenced this action under the Civil Rights Act, 42 U.S.C. §1983, against the City of New York and the administrators of the Parks, Recreation and Cultural Affairs Administration, seeking declaratory and injunctive relief in the Southern District of New York. Their amended complaint (A3-A8)[2] broadened the legal issues from

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[2]The Appendix hereto is referred to in the form "p.__A" and the Appendix in the Circuit Court, a copy of which is transmitted herewith, is referred to in the form "A__."

the defense of the state criminal case it sought relief not only against Section 13 of the Rules and Regulations but also against Section 11(a),[3] alleging that the two sections taken together, on their face and as applied, created an unconstitutional mechanism for censorship (A7-A8). The complaint sought no relief against the state convictions for violating the regulations, but rather sought prospective relief on the ground that "plaintiffs have been and are being deterred from making, continuing or completing the distribution" of the leaflets originally involved, "and of similar and other pamphlets, placards, signs and other appeals addressing the political statements made therein" (A7).

The defendants moved to dismiss the complaint on various grounds, including res judicata, and on May 31, 1973 both plaintiffs moved for a preliminary injunction against the enforcement of Section 13 of the Rules and Regulations. In his supporting affida-

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[3]Section 11(a) provides: "A permit may be granted upon such terms and conditions as the Administrator shall reasonably impose. Every permit shall be of a duration reasonably deemed appropriate by the Administrator for the use of the park and its facilities by the public. The Administrator shall prescribe and make readily available forms of application for permits and copies of the Rules and Regulations in force. In granting a permit, the Administrator shall have the power to require a deposit or collateral or surety as a protection to the City."

vit (A37-A38), Lockshon indicated that his "intention to distribute these leaflets is subject to the qualification that [he] will attempt no distribution if threatened with or subject to criminal prosecution for violation of Section 13," to which he had been subjected only a few months before.

Following an evidentiary hearing on June 13, 1973, the District Court (Hon. Milton Pollack) denied the motion for a preliminary injunction, and on June 25, 1973, issued an opinion and order dismissing plaintiffs' amended complaint on the sole ground that the principle of res judicata barred the federal civil rights claim. Judge Pollack specifically found that the amended complaint pleaded a case or controversy, and would withstand a motion to dismiss for failure to state a claim upon which relief may be granted (App. pp. 30A-31A).

Both plaintiffs appealed and, on essentially the same grounds used by the District Court, the Court of Appeals affirmed, one judge dissenting. The majority held that the action was barred because "it was determined by a court of competent jurisdiction [the state court] that it was proper for the Parks Administration to require distributors of political literature who wish to distribute their pamphlets in a park to obtain a permit," (App. p. 5A), and because plaintiffs had "elected" to present their defenses to a state criminal court (App. p. 6A). Judge Oakes dissented from both holdings. The Court of Appeals

denied a petition for rehearing and rehearing in banc, Judge Oakes again dissenting from the latter on August 6, 1974. Petitioner William Thistlethwaite seeks a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

I.

IMPORTANT SIMILAR ISSUES ARE ALREADY PENDING BEFORE THIS COURT

This case is similar to Ellis v. Dyson, pending in this Court, No. 73-130, certiorari granted April 22, 1974. There, the petitioners, convicted under an allegedly unconstitutional loitering ordinance, sought declaratory relief against its future enforcement. One issue in that case, as here, was whether the state court convictions precluded the federal civil rights action for declaratory relief, although the issue was couched in somewhat different language. The District Court in that case, 357 F. Supp. 263 (N.D. Tex.), aff'd without opinion, 475 F.2d 1402 (5th Cir. 1973), held that the principles of Younger v. Harris, 401 U.S. 1 (1971), precluded even a prospective attack on a state criminal statute when the criminal prosecution is completed.

By granting a writ of certiorari in the present case, in which the lower court decisions are based on collateral estoppel or res judicata by the criminal litigation, this Court will be able to decide whether an expired criminal prosecution for a past violation of a criminal statute bars prospective federal civil rights relief either as a matter of comity or of issue preclusion.

The case at bar presents somewhat simpler problems of federalism than Ellis v. Dyson, because here the petitioner has appealed his original state conviction up through the state court system, and has thus made clear the fact that the state criminal process cannot afford him relief at any level.

II.

THIS CASE PRESENTS ISSUES OF GREAT IMPORTANCE TO FEDERAL CIVIL RIGHTS JURISDICTION

A. Impact of the Decision Below.

Section 1983 of Title 42 of the United States Code was enacted shortly after the Civil War pursuant to the Fourteenth Amendment to afford a remedy "supplementary" to any state remedy against actions under color of state law which infringe or fail to enforce federal rights. Monroe v. Pape, 365 U.S. 167, 183 (1961).

In Mitchum v. Foster, 407 U.S. 225 (1972), this court once again reviewed the historical background, with an eye particularly to the possible abuse of federal rights by state courts, concluding:

> It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, . . . whether that action be executive,

> legislative, or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25 L.Ed. 676, 679 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. 407 U.S. at 240.

These broad principles of federal judicial power to enforce constitutional rights are set about by restraints of "equity, comity and federalism" Id. at 243.

Principles of comity prevent federal courts from interfering in a pending state court prosecution, except under extraordinary circumstances, either by injunction, Younger v. Harris, supra, or declaratory judgment, Samuels v. Mackell, 401 U.S. 66 (1971). The considerations are different where no prosecutions are pending. Steffel v. Thompson, 415 U.S. 452 (1974), decided last term, was concerned with declaratory relief, such as was sought in the present case, when a state prosecution is not pending, but only threatened. (The petitioner's companion was arrested while distributing leaflets and petitioner had left the scene to avoid arrest.) This Court based its decision permitting declaratory relief upon its

> recognition that the relevant principles of equity, comity and federalism "have little force in the absence of a pending state proceeding," Lake Carriers' Ass. v. MacMullan, 406 U.S. 498, 509.[4] 415 U.S. at 462.

In the absence of a pending prosecution or an immediate threat, as in the Steffel case, which is of a type that Justice Stewart described as "exceedingly rare," 415 U.S. at 476, the jurisdiction of the federal courts to afford relief against enforcement of a state criminal enactment is ringed around with problems of standing and mootness. In O'Shea v. Littleton, 414 U.S. 448 (1974), also a civil rights case, it was held that the plaintiffs did not allege a case or controversy in part because "[n]one of the named plaintiffs is identified as having himself suffered any injury in the manner specified." 414 U.S. at 495. "Past wrongs," the Court said, "are evidence bearing on whether there is a real and immediate threat of repeated injury." 414 U.S. at 496. To the same effect is Boyle v. Landry, 401 U.S. 77 (1971), in which the

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[4] Lake Carriers' Ass. v. MacMullan, supra at 509, intimates that a similar result would be appropriate for injunctive relief where no prosecution is pending.

statute under attack had never been used against plaintiffs or members of their class.

A case like the present one, where the plaintiff has completed the state court proceedings and seeks only prospective relief, without attacking his underlying conviction, assumes great significance for the preservation of "the role of the federal government as a guarantor of basic federal rights against state power," Mitchum v. Foster, supra, 407 U.S. at 234. For it fits precisely within the requirements laid down in the recent decisions of this Court:

(a) it does not violate comity by interfering with an ongoing proceeding;[5]

(b) it does present a case or controversy because the petitioner has been subjected to injury under the ordinance which he seeks to attack.

The decision of the Second Circuit Court of Appeals in this case bars the attack on constitutional grounds, either through declaratory or injunctive relief, on the prospective enforcement of an ordinance precisely at the place where the comity interest is weakest, and the standing of the plaintiff is strongest. The consequences of the decision are momentous as to any matter touching upon constitutional rights, for which any local

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[5]The comity interest of the state is further reduced by the fact that a local parks regulation is involved, rather than a statute of state-wide application.

body may choose the criminal law as a means of regulation; it reduces the federal civil rights jurisdiction to one of little more than academic interest, to the class of those "exceedingly rare" cases which may fall within Steffel v. Thompson, supra.

The decision of the Second Circuit ignores the basic purpose of Section 1983 of the Civil Rights Act: to afford a remedy supplementary to any state remedy in order to prevent or rectify unconstitutional actions by state officials, including the judiciary. Mitchum v. Foster, supra. The decision below assumes that even when considerations of comity and standing or equity are absent, the federal court is obliged to accept the decision of the state court on a federal constitutional matter. The entire history of Section 1983 is to the contrary.

The consequence of the decision below is to creat confusion in the allocation of federal rights as between the state and federal courts. It is established that where a plaintiff "elects" to present his federal claims to the state courts, by bringing his case to those courts, or presenting his federal claims to them when a federal court abstains, he is bound by the result. E.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). But there can be no "election" of the state court as a forum by a defendant in a criminal action. He is brought into court by the state, and is obliged to defend

himself;[6] it is absurd to pretend that he has "elected" the state forum. It is equally absurd to require him to refrain from asserting constitutional defenses to his criminal prosecution in order to preserve them for a federal civil rights action, particularly where, as here, the constitutional defenses were practically the only ones available.[7]

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[6]Both the Second Circuit and the District Court (App. pp. 6A, 28A) noted a sentence by the plaintiff Lockshon at the hearing on the preliminary injunction, in which he recalled "somebody from some agency" saying, "Let's drop the whole matter," at the time of his prosecution in 1971. Lockshon apparently refused, but certainly his consent was not needed for the state to dismiss the prosecution. Moreover, this cannot prove that Lockshon "elected" to be arrested and prosecuted. The "somebody" did not offer to rescind the regulation and void the threat of prosecution for future distributions; the pendency of the case itself proves that. Further, any conceivable effect on Lockshon cannot operate to bar petitioner Thistlethwaite. See also Oakes, J. dissenting, App. p. 13A, fn. 7.

[7]The Second Circuit emphasized the point in Lombard v. Board of Education, ___ F. 2d ___, (July 22, 1974, Docket No. 73-2057), a civil rights case which supports the right of the plaintiff to raise constitutional issues not raised by him as plaintiff in a preceding state civil case.

B. Misconception of Collateral Estoppel.

The conclusions of the Second Circuit have grown out of an error concerning the doctrine of collateral estoppel which has serious constitutional consequences. The doctrine would be applicable only if the facts in this case and the criminal case were identical and inseparable. Commissioner v. Sunnen, 333 U.S. 591 (1948). If that were the case, then of course this would be an attack on the conviction, and petitioner might be obliged to seek a writ of habeas corpus.[8] But petitioner in no way seeks to attack his conviction; he seeks prospective relief, for future threatened injury. As Judge Oakes, dissenting in the Second Circuit, said:

> ...Were appellants here attacking the judgment of their conviction in the city court, then the majority would be correct in dismissing their civil rights complaint and suggesting the alternative of habeas, but appellants have made it clear that they are done with the past and their concern is the future. To hear their claims and grant them their relief would allow

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[8]Habeas corpus was very likely not available, because for such a minor offense as that of petitioner, when the fine is paid, there is no "custody." More important, habeas corpus has no prospective effect against other prosecutions as does declaratory or injunctive relief.

> appellants to hand out leaflets in the park, but it would not affect one iota their convictions for violations of the ordinance. And more importantly, we would not be deciding an issue already litigated and decided in the state court, for it simply is not the same question whether an ordinance requiring permits is unconstitutionally applied by screening applicants by the content of their leaflets or is unconstitutional on its face so as to void the convictions of one who never knew of or applied for a permit to distribute. (App. pp. 11A-12A).

One effect of the erroneous application of the doctrine of collateral estoppel in this case is to curtail the effectiveness of the First Amendment. Petitioner here has pleaded his desire to express himself in the future; the court below rules that his past conviction forever prevents him from challenging the constitutionality of the ordinance under which he was convicted, and the administrative schema used to implement it, in a federal court. Such a conclusion is at odds with the aims of federal civil rights jurisdiction as set forth in the decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 639—September Term, 1973.

(Argued March 7, 1974 Decided May 13, 1974.)

Docket No. 73-2399

WILLIAM THISTLETHWAITE
and SOL LOCKSHON,

Appellants,

v.

THE CITY OF NEW YORK, THE PARKS, RECREATION AND CULTURAL AFFAIRS ADMINISTRATION, and AUGUST HECKSCHER AND RICHARD M. CLURMAN, as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration,

Appellees.

Before:

MOORE, MANSFIELD and OAKES,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Milton Pollack, *Judge*, dismissing appellants' complaint under the Civil Rights Act, 42 U.S.C. §1983, on the grounds that it was barred by the principle of res judicata.

Affirmed.

RICHARD C. LEVIN, New York, N. Y. (Paul G. Chevigny, Richard G. Lyon, and David M. Olasov, New York, N. Y., of counsel), *for Appellants.*

NINA G. GOLDSTEIN, Office of the Corporation Counsel of the City of New York, New York, N. Y., (Adrian P. Burke, Corporation Counsel of the City of New York, and Milton H. Harris, of counsel), *for Appellees.*

MOORE, *Circuit Judge:*

Appellants, William Thistlethwaite and Sol Lockshon, were convicted in New York County Criminal Court of violating Section 13 of New York City's Parks, Recreation and Cultural Affairs Administration's Rules and Regulations by distributing pamphlets of a political nature in Central Park without the permit required by that section.[1] They were each sentenced to pay a fine of $10 or to spend two days in jail. Both paid the fine. They then appealed to the Appellate Term where their convictions were affirmed without opinion. Application for leave to appeal to the

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1 Section 13 provides:

No person shall hold any meeting, perform any ceremony, make an address, exhibit or distribute any sign, placard, declaration or appeal of any description in any park or park-street, except by permit by Parks, Recreation and Cultural Affairs Administration. Upon application, the Administrator shall issue such permit unless: (1) the use for which the permit is sought would substantially interfere with park use and enjoyment by the public; (2) the location selected is not suitable because of special landscaping and planning; (3) the location is not suitable because it is a specialized area including, but not limited to, a zoo, swimming pool, or skating rink; (4) the date and time requested have previously been allotted by permit. Whenever a permit is denied, alternative suitable locations and dates shall be offered to the applicant.

New York Court of Appeals was denied, and appellants chose not to petition for review of this order by means of certiorari.

Appellants then brought the present action in the Federal District Court, seeking, on the basis of the Civil Rights Act, 42 U.S.C. §1983(1970), a declaratory judgment to the effect that Regulation 13 and the general permit dispensing system[2] were unconstitutional. As part of this action, appellants moved for a preliminary injunction against the defendants, their agents and employees, to prevent them from enforcing the regulations. The judge below held an evidentiary hearing in connection with this motion and decided against the appellants. Thereafter, the judge decided against the appellants on the merits of their case, holding them barred by res judicata.

The judge below, in reaching his decision, concluded that since there is no doubt that state forums can be appropriate for the determination of issues arising under the Federal Constitution, if an issue is argued before a state tribunal, its resolution at that level carries with it all the usual effects of res judicata required by full faith and credit. Thus, while it is clearly a federal policy to allow to every plaintiff with a colorable claim his day in court, it is equally clearly not a court's duty to encourage career litigants by allowing federal duplication of state trials. Thus, the District Court concluded, where there has been a clear election by the plaintiff of the state forum, that court's

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2 The rule in question, Section 11(a), provides:

> A permit may be granted upon such terms and conditions as the Administrator shall reasonably impose. Every permit shall be of a duration reasonably deemed appropriate by the Administrator for the use of the park and its facilities by the public. The Administrator shall prescribe and make readily available forms of application for permits and copies of the Rules and Regulations in force. In granting a permit, the Administrator shall have the power to require a deposit or collateral or surety as a protection to the City.

decision may, under the concepts of res judicata, preclude a new consideration of the Constitutional claims by federal courts in a suit under the Civil Rights Act.

Appellants vigorously contest this conclusion. It is argued that this suit which seeks prospective relief cannot be barred by a prior suit based on facts locked soundly in the past. It is further submitted that a §1983 action is separate and different from any other cause of action arising under the same facts, and the usual dictates of res judicata should therefore bow to the intent of Congress to create an alternative method of vindicating Constitutional rights. Finally it is argued that there can be no election of forum in a criminal action, and that it is improper to require a defendant to stand mute in the dock to avoid "electing" against his right to a federal forum.

In the current context we find these arguments unpersuasive. It is said, for example, that the present cause of action is different from the prior criminal suit because it attacks the whole system of permit dispensing and seeks prospective relief against its enforcement. However, it is quite clear that the gist of the current suit is that the regulations are unconstitutional; it is also clear that this question was at issue and determined against the appellants in the state action. A perusal of the briefs submitted to the Appellate Term cannot fail to convince that the whole regulatory system was assailed, on its face and as applied to appellants. Memorandum of Appellants in Support of Certification to the Court of Appeals at 3; Brief for Appellants in the Appellate Term, First Department at 9-10. We are thus convinced that the assault was broadly based and broadly considered. Nor does the prospective nature of the relief sought necessarily preclude estoppel. In appellants' view there has been merely a determination of law based on "expired" facts and the prior decision should be con-

sidered here solely on the basis of stare decisis—persuasive perhaps but certainly not conclusive. However, it was in fact determined by a court of competent jurisdiction that it was proper for the Parks Administration to require distributors of political literature who wish to distribute their pamphlets in a park to obtain a permit. If this determination, applying the regulation in question to facts identical to those presently alleged, is seen to bind appellants, they certainly cannot succeed on the present course of litigation.

Having argued that a strict application of the rules of collateral estoppel will not bar this action, appellants in the alternative contend that the policy underlying the Civil Rights Act would best be served by denying the effects of collateral estoppel under these circumstances. As appellants argue:

> Therefore to apply these doctrines [res judicata and collateral estoppel] mechanically to all §1983 actions would be to thwart a Congressional determination that the policies and rights embodied in §1983 are often of a higher priority than the competing policies of judicial economy and comity.

Appellants' Br. at 18.

While we recognize the particular nature of the Civil Rights Act and the intent of Congress embodied therein, we are not of the opinion that the trial judge applied the doctrines of res judicata "mechanically" to the facts of this case; further we do not read in the act any intent to foster career litigants. *Lackawanna Police Benevolent Association* v. *Bal* 446 F.2d 52 (2d Cir. 1971); *see also Rosenberg* v. *Martin*, 478 F.2d 520, 525 (2d Cir. 1973); Friendly, Federal Jurisdiction: A General View 101 n. 113. Thus, we do not see reason to overturn the judgment of the court below.

Finally, it is argued that there was in fact no election of the state forum. It is contended that a criminal defendant is given no choice as to the time and the place of his prosecution. The picture is presented to us of a prisoner in the dock standing mute for fear of losing his right to a federal adjudication of his constitutional claims. We are not convinced that an election of the state tribunal is required to hold the present action barred by collateral estoppel. In fact we are unclear how a determination of the constitutionality of the Regulation could be avoided at the state level. Since the appellants were unaware of the Regulation, it cannot be said that they chose to bring on their prosecution by deliberately violating it; nor do we see how the trial court or any appellate court could avoid scrutinizing the Regulation for possible constitutional defects even at appellants' request. However, in connection with this argument there are two matters that should be raised in passing. First, although, as was stated above, the usual criminal case provides little suggestions of election, the present case provides a good deal more. To quote Mr. Lockshon:

> All I know is before trial started there was somebody from some agency and he said, "Let's drop the whole matter," and since I had begun it I said, "No, this I think is a Constitutional thing. I have a right to give out leaflets. I want to go through with this thing."

62a.

Although it is correct, as appellants contend, that Mr. Lockshon cannot "elect" for Mr. Thistlethwaite, it is apparent that they had the same attorney and were pursuing their remedies in conjunction. Thus, it might be argued, that Mr. Lockshon, in declining the offer, acted as spokesman. At the very least, it seems clear that both of them

had determined to pursue the New York action to a conclusion on constitutional grounds. Second, it should be noted that habeas corpus is generally available in situations similar to the one at hand. Should the appellants show "possible adverse collateral effects" of their conviction, they can gain a federal hearing by that route. *Benton* v. *Maryland*, 395 U.S. 784 (1968); *see also Sibron* v. *New York*, 392 U.S. 40 (1968); and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

For the above reasons, the judgment of the court below is affirmed.

OAKES, *Circuit Judge* (dissenting):

I dissent. The decision of the majority, without citation to any relevant authority, for the first time to my knowledge, applies the doctrine of res judicata or collateral estoppel to bar a § 1983 action challenging the constitutionality of a law solely on the basis that the plaintiff has been at one time convicted of a violation of that law. As such the majority opinion is an entirely unwarranted extension of the decisions of this court on collateral estoppel in civil rights actions; it is contrary to the underlying law of collateral estoppel generally;[1] and it sets a precedent in the area of first amendment challenges that is, to say the least, unfortunate.

To understand the issues clearly it is necessary to state the facts in more detail than does the majority. Thistlethwaite's conviction of a violation of § 13 of the Rules and Regulations of the New York City Parks, Recreation and Cultural Affairs Administration (the "Rules and Regu-

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1 Res judicata is not really here involved since none of the defendants named as parties herein were parties to the earlier suit. *United States* v. *Harrison County*, 399 F.2d 485, 491 (5th Cir. 1968), *cert. denied*, 397 U.S. 918 (1970).

lations")[2] was on January 13, 1972, in the Criminal Court of the City of New York for the distribution in Central Park on June 27, 1970, of a political pamphlet advocating boycott of the movie "Woodstock Nation" as a "capitalistic profanation" by a large American corporation ("WARNER BROS."). Lockshon's conviction of such a violation was on the same date (in a consolidated proceeding) but for the entirely unrelated distribution of a pamphlet in protest of the Indochina war on April 17, 1971, on the southwest sidewalk at the corner of 81st Street and Central Park West, near the American Museum of Natural History. Throughout the New York courts, the only arguments made by the two, appellants here, were that § 13 was unconstitutional *on its face*.[3] Here they brought suit seek-

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2 Section 13. Meetings.

No person shall hold any meeting, perform any ceremony, make an address, exhibit or distribute any sign, placard, declaration or appeal of any description in any park or park-street, except by permit from Parks, Recreation and Cultural Affairs Administration. Upon application, the Administrator shall issue such permit unless: (1) the use for which the permit is sought would substantially interfere with park use and enjoyment by the public; (2) the location selected is not suitable because of special landscaping and planting; (3) the location is not suitable because it is a specialized area including, but not limited to, a zoo, swimming pool, or skating rink; (4) the date and time requested have previously been allotted by permit. Whenever a permit is denied, alternative suitable locations and dates shall be offered to the applicant.

While § 13 contains no explicit reference to "pamphlets" or "handbills", appellants were convicted for its violation so that something in it has been construed by the New York authorities and courts to include handbills and pamphlets.

3 Their contention in the motion to dismiss before the Criminal Court was that "this or any licensing requirement for an individual's distribution of political literature in parks of the City of New York is in contravention of the free speech and free press guarantees of the Federal and New York State Constitutions." (Motion to Dismiss 2-3.) Their contention before the Appellate Term was "that the regulation is unconstitutional on its face." (Brief to App. Term 5.) So was their argument to the Court of Appeals: ". . . Section 13 is unconstitutional on its face . . . . And it is on this basis that petitioners seek review at

ing declaratory and injunctive relief on the basis that § 13 as implemented by § 11(a) of the Rules and Regulations[4] "both as fully implemented and as applied to plaintiffs" (Par. 20 Complaint) is unconstitutional, particularly on the basis that the "permits . . . purportedly required by Section 13 of the Rules and Regulations, have not been, and are not being, issued by the Administration."

The issue whether § 13 is void on its face is entirely different from the question whether § 13 as applied is permissible. I say the issue is different, because the facial challenge in the criminal cases to § 13 alone raised only the question whether a city may constitutionally require permits to be obtained under conditions having a rational relationship to the interests of the public in enjoyment of parks and their facilities. Section 13 *on its face* requires permits to be issued except when certain specific reasons exist for denial—as where there would be interference with park use by others, use of a site in a specialized area such as a zoo or swimming pool, use of a

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the Court of Appeals." (Memorandum in Support of Certification to the Court of Appeals 3.) The majority's claim that the Rules and Regulations were attacked "as applied" as well is simply not supported by the record.

4 Section 11(a) reads:

> A permit may be granted upon such terms and conditions as the Administrator shall reasonably impose. Every permit shall be of a duration reasonably deemed appropriate by the Administrator for the use of the park and its facilities by the public. The Administrator shall prescribe and make readily available forms of application for permits and copies of the Rules and Regulations in force. In granting a permit, the Administrator shall have the power to require a deposit or collateral or surety as a protection to the City.

In implementing this section the Administrator has caused permit applications to be made which state: "It is prohibited to distribute . . . any pamphlets, handbills, placards, signs or any other appeals . . . within any park or on any park street" (Par. 4) and "The permit . . . is revocable at any time in the absolute discretion of the Commissioner." (Par. 9.)

preempted site and time. Under such circumstances, even when the permit is denied, § 13 requires that "alternative suitable locations and dates should be offered to the applicant." Thus, under *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953), relied upon by appellees here, it is at least probable that § 13 is valid *on its face*.[5] *Compare Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969).

But here appellants contest the constitutionality of § 13 as implemented by § 11(a) and the provisions of the permit application which, taken together, facially appear to prohibit *any* distribution of pamphlets or handbills in parks or park streets, note 3 *supra*.[6] This issue was not litigated in the state court, and I am not aware of any decision holding that collateral estoppel applies to issues

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5 *Poulos*, however, has been strongly criticized. *See, e.g.*, Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 542-43 (1970).

6 Appellees argue that "the evidence at the hearing below confirmed that permits are issued as a matter of course and, in accordance with [Section 13's] language, only so as to deal reasonably with the various competing uses of the parks (A68-74)." (Brief p. 20) While the evidence in question fails to support the assertion that permits are issued "as a matter of course," it does contain the City's assertion that paragraph 4 of the permit application, which explicitly prohibits distribution of leaflets, is "interpreted to mean that no distribution of leaflets or other matter is permitted unless it's specifically permitted by the terms of the permit." (A-81.) In fact, appellant Lockshon was once in June, 1973, just before the hearing on the preliminary injunction in this case, apparently issued a permit under certain prescribed circumstances. There is no real evidence, however, and there are no findings in any event, as to whether paragraph 4 is often used by the authorities to say, as Lockshon claimed a Mr. Saks of the Parks Department said to him in reference to distributing leaflets in Central Park, "Nothing doing . . . Well, number four says . . . you are not allowed to distribute leaflets in the park." (A-53). In short, on the record before us, the implication is that the permit system has been used to disallow leaflets the content of which the Commissioner or his lieutenants disapprove. Whether this implication would be borne out by a trial on the merits is a question that will never be determined, however, for, although none of these allegations and defenses were raised, much less litigated, in the state court, the majority finds them barred by collateral estoppel from determination here.

not litigated on facts not presented. "Issue preclusion," as collateral estoppel is now sometimes called, has always applied only to those issues completely litigated and specifically determined. *Cromwell* v. *County of Sac*, 94 U.S. 351, 353 (1876); *Syms* v. *McRitchie*, 187 F.2d 915, 918 (5th Cir. 1951).

Certainly our own *Lackawanna Police Benevolent Association* v. *Balen*, 446 F.2d 52 (2d Cir. 1971) (per curiam), and *Rosenberg* v. *Martin*, 478 F.2d 520, 525 (2d Cir. 1973), the only cases relied on by the majority, do not go so far. *Lackawanna* involved a direct constitutional challenge in a federal § 1983 action on the same grounds with the same parties and with the same facts as had already been tried in a civil action in the state court. In addition, in *Lackawanna* the plaintiff had voluntarily chosen the state court as his initial forum. In *Rosenberg* the plaintiff brought a § 1983 action for damages caused by his being deprived of a fair trial through pretrial publicity. There then Chief Judge Friendly allowed that:

> It might be contended against giving the New York judgment preclusive effect that . . . a state criminal judgment should have no more effect by way of issue preclusion in a federal civil rights action than it would in federal *habeas*. . . .

478 F.2d at 525. In *Rosenberg* that contention was not answered, because the plaintiff's constitutional claim that he was deprived of a fair trial had already been disproven *both* in the state courts *and* in the federal court pursuant to a habeas petition.

The cases cited in H. Friendly, Federal Jurisdiction: A General View, 101-02 n. 113 (1973), are equally inapposite. All involve the attempt to upset the *judgment* of a state court through collateral attack. Were appellants here at-

tacking the judgment of their convictions in the city court, then the majority would be correct in dismissing their civil rights complaint and suggesting the alternative of habeas, but appellants have made it clear that they are done with the past and their concern is the future. To hear their claims and grant them their relief would allow appellants to hand out leaflets in the park, but it would not affect one iota their convictions for violations of the ordinance. And more importantly, we would not be deciding an issue already litigated and decided in a state court, for it simply is not the same question whether an ordinance requiring permits is unconstitutionally applied by screening applicants by the content of their leaflets or is unconstitutional on its face so as to void the conviction of one who never knew of or applied for a permit to distribute.

Nor are the judicial-conservation policies to be served by the doctrine of issue preclusion at all upheld by advancing that doctrine here. The most that this decision does is to prevent Messrs. Thistlethwaite and Lockshon from asserting the unconstitutionality of § 13, merely delaying the determination on the merits, for anyone else may still and undoubtedly will bring the issue of constitutionality of §§ 13 and 11(a) as applied to the federal courts in a § 1983 proceeding. Indeed it might be said that the application of "issue preclusion" in civil rights litigation can increase the federal courts' burden which so many bemoan: one case to determine whether there is collateral estoppel; another to raise the issue, regardless of the outcome of the first, for inevitably there are numbers of potential plaintiffs willing to test such laws at least when represented by one of many "public interest" legal organizations.

As the court below recognized there is *no* case which has held collateral estoppel to result from a criminal conviction so as to defeat a civil rights action seeking a decla-

ratory judgment as to future enforcement of a statute. It is doubly unfortunate, I think, that the first such case is one in which the right asserted to have been violated is a preferred right — that of free expression of political thought. If any right is to be protected this would seem to be it. I suppose one can fault a given plaintiff, in the majority's terminology, for being "a career litigant" although appellants' *involuntary* defense of a criminal action in the state courts[7] and their institution of a single federal civil rights action in respect to a very important matter—the right to distribute handbills or leaflets in New York City parks or on "park-streets"—hardly seems to me to justify the majority's derogatory appellation. But regardless how appellants individually may be characterized, their asserted rights to distribute in the future are significant and so significantly different from those adjudicated in the New York criminal case as to preclude application of the doctrine of collateral estoppel here.

I would reverse the judgment dismissing the complaint and remand.

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7 The majority acknowledges that "Since the appellants were unaware of the Regulation, it cannot be said that they chose to bring on their prosecution by deliberately violating it . . . ."

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-four.

Present: HON. LEONARD P. MOORE,
HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,

Circuit Judges.

William Thistlethwaite and Sol Lockshon, Plaintiffs-Appellants, v. The City of New York, The Parks, Recreation and Cultural Affairs Administration, and August Heckscher and Richard M. Clurman, as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration, Defendants-Appellees.	73-2399

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

by: /s/ Vincent A. Carlin
Vincent A. Carlin
Chief Deputy Clerk

New York, New York
August 6, 1974

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-four.

----------x

William Thistlethwaite and
Sol Lockshon,

Plaintiffs-Appellants,

v.

The City of New York, The Parks, Recreation and Cultural Affairs Administration, and August Heckscher and Richard M. Clurman, as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration,

73-2399

Defendants-Appellees.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and a poll of the judges in regular active service having

been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Oakes dissents.

/s/ Walter R. Mansfield

Acting Chief Judge
WALTER R. MANSFIELD

New York, New York
August 6, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WILLIAM THISTLETHWAITE and SOL LOCKSHON,

Plaintiffs,

v.

THE CITY OF NEW YORK, THE PARKS, RECREATION AND CULTURAL AFFAIRS ADMINISTRATION, and AUGUST HECKSCHER and RICHARD M. CLURMAN as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration,

Defendants.

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OPINION

POLLACK, District Judge.

This suit is brought pursuant to the Civil Rights Statute, 42 U.S.C. §1983, and jurisdiction is conferred over such a suit by 28 U.S.C. §§1331 and 1343. The plaintiffs claim that restrictions imposed upon pamphleteering in the parks of New York City represent an abridgement of free speech and are violative of the First Amendment. The attack herein is levelled against Section 13 of the rules promulgated by the City's Department of Parks named herein as defendant.

The defendants have moved to dismiss the complaint, on the grounds that no live case or controversy exists; that principles of res judicata preclude this suit; and, that the complaint fails to state a claim upon which relief may be granted.

For the reasons given hereafter, the complaint must be dismissed on the ground that it is barred by a former adjudication of a criminal proceeding involving a violation of the same rule by these plaintiffs resulting in a conviction for unlicensed pamphleteering in the parks.

I. Prior Proceedings

On or about June 27, 1970, plaintiff Thistlethwaite was arrested and charged with violation of Section 13, which provides:

> No person shall hold any meeting, perform any ceremony, make an address, exhibit or distribute any sign, placard, declaration or appeal of any description in any park or park-street, except by permit from the Parks, Recreation and Cultural Affairs Administration. Upon application, the Administration shall issue such permit unless: (1) the use for which the permit is sought would substantially interfere with park use and enjoyment by the public; (2) the location selected is not suitable because of special landscaping and planting; (3) the location is not suitable because it is a spe-

> cialized area including, but not limited to, a zoo, swimming pool, or skating rink; (4) the date and time requested have previously been allotted by permit. Whenever a permit is denied, alternative suitable locations and dates shall be offered to the applicant.

Plaintiff Lockshon was arrested and charged with the same violation on or about April 17, 1973. Plaintiffs were tried in a consolidated proceeding before Judge Morgan E. Lane, Criminal Court, New York County, on January 13, 1972. At trial, plaintiffs moved to dismiss the prosecution asserting that Section 13 was unconstitutional "as drafted, as applied with respect to these individuals." The Court rejected this defense and found them guilty, sentencing each to a fine of $10.00 or two days in jail. An appeal was taken to the Appellate Term, New York Supreme Court, where the issue of the purported unconstitutionality of the section and of the procedure it created was fully briefed by the plaintiffs.[1] The Appellate Term affirmed the convictions on November 17, 1972 without opinion, and leave to appeal to the New York Court of Appeals was denied December 22, 1972. Plaintiffs did not seek review by the United States Supreme Court, nor did they

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[1] A portion of the trial transcript and the brief filed on the state appeal have been made part of the record herein.

seek post-conviction collateral relief in the nature of habeas corpus.

The civil rights complaint herein was filed April 4, 1973, and -- with leave of the Court -- was amended June 13, 1973. During the pendency of defendants' motion to dismiss the complaint, plaintiff Lockshon asserted a desire to make immediate distribution of literature in the parks, and a petition for preliminary relief was filed. An evidentiary hearing was duly held on June 13, 1973, at the conclusion of which the Court found insufficient proof of immediate, irreparable harm and of probable success on the merits and found the balance of equities favoring the defendants. Accordingly, provisional relief was denied.

Although the focus of the evidentiary hearing was on the request for a preliminary injunction, the parties were given an opportunity to argue the legal issues presented by defendants' motion to dismiss and some of the evidence adduced at the hearing was directed to that motion. The record of such an evidentiary hearing may be considered part of the record in ruling on the present motion to dismiss the complaint. Cf., Fed. R. Civ. P. 12(d) and 65(b).

II. Res Judicata

Defendants contend that the state judgment and proceedings operate to preclude litigation by these plaintiffs of the constitutional challenge in this civil rights suit.

The defense of res judicata, while contained in the list of affirmative defenses in Fed. R. Civ. P. 8(c), is not enumerated in Fed. R. Civ. P. 12(b) as a ground for pre-trial motion to dismiss. However, it is generally held that, in the interest of efficient and expeditious judicial administration, res judicata can be raised and considered at a pre-trial stage. Katz v. State of Connecticut, 307 F. Supp. 480 (D. Conn. 1969), aff'd, 433 F.2d 878 (2d Cir. 1970); 5 Wright and Miller, Federal Practice and Procedure, §1360 (1969).

While it may be proper to consider the issue raised by defendants at this point, its resolution is not without difficulty. No case has been cited by either party which conclusively states whether or not a constitutional challenge to a state statute may be pursued in a federal civil rights suit after the challenge has been unsuccessfully litigated by the same party as a defense in a prior state criminal prosecution.

It appears to this Court that where, as here, persons have previously been criminally prosecuted in a state court for violation of a local park rule against pamphleteering resulting in a conviction[2], the convicted defendants ought not to be

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[2] The res judicata effect of an acquittal in a criminal prosecution in a subsequent civil suit is more difficult to delineate, due to the differences in the burden of proof associated with each type of pro-

permitted to maintain a civil irghts suit seeking a declaration of constitutional invalidity and an injunction against enforcement of the questioned local rule, when they have affirmatively raised the unconstitutionality of the local rule in the criminal proceeding and pursued that challenge on appeal through the state courts.

It is clear that a judgment entered by a state court of competent jurisdiction must be accorded full faith and credit by federal courts and that determinations made by a state court can, under controlling principles of res judicata, and collateral estoppel, preclude relitigation in the federal system. American Surety Company v. Baldwin, 287 U.S. 156 (1932); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); see generally, Comment, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Determinations, 52 Va. L. Rev. 1360 (1967). This applies even to state determinations of fact which, if binding, limit the ability to pursue federal constitutional rights in federal court. See, Taylor v. New York City Transit Authority, 433 F.

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ceeding. See, 1B Moore, Federal Practice ¶0.418 (1965). The effect of criminal judgments in subsequent judicial proceedings is presently being considered by the Reporters for the Restatement of Judgments. ALI, Restatement of the Law of Judgments 2d, Tent. Draft No. 1, xv (1973).

2d 665 (2d Cir. 1970); Kabelka v. City of New York, 353 F. Supp. 7 (S.D.N.Y. 1973); Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969).

Even though the United States Constitution may, in the public mind, be associated with federal courts, the trustees charged with preserving and applying the federal constitution include in their number state judges as well as federal judges. See Angel v. Bullington, 330 U.S. 183 (1947); H. Friendly, Federal Jurisdiction: A General View 90 (1973). Accordingly, state court rulings on federal constitutional issues cannot be collaterally challenged by the parties to the state action in civil rights actions in federal district court, Bricker v. Crane, 468 F.2d 1228, 1231 (1st Cir. 1972); the deferal court is without jurisdiction to hear constitutional cases already adjudicated by the state courts. Paul v. Dade County, 419 F. 2d 10 (5th Cir. 1969), cert. denied, 397 U.S. 1065 (1970), noted in 24 Univ. of Miama L. Rev. 835 (1970).

Each litigant with at least a colorable constitutional challenge should be accorded his day in court; however, the civil rights statute, 42 U.S.C. §1983, was not designed to sponsor career litigants or to allow duplicative efforts to prevail. Lackawanna Police Benevolent Association v. Balen, 446 F.2d 52 (2d Cir. 1971) (per curiam). Where a litigant affirmatively decides to launch his constitutional battle in a state civil suit and

sues that battle through the state court system, he has chosen to by-pass the opportunity to begin a federal civil rights suit in the district court. Brickner v. Crane, 468 F.2d 1228 (1st Cir. 1972); P. I. Enterprises, Inc. v. Cataldo, 457 F.2d 1012 (1st Cir. 1972); Lakawanna Police Benevolent Association v. Balen, 446 F. 2d 52 (2d Cir. 1971)(per curiam); Howe v. Brouse, 422 F.2d 347 (8th Cir. 1970); Deane Hill Country Club v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967). This conclusion is required in the interests of judicial husbandry, the policy of comity between federal and state courts, and the equity of protecting opposing parties -- usually governmental officials -- from vexatious duplicative litigation. See also, H. Friendly, Federal Jurisdiction: A General View 101-2 (1973).

However, an actual election of the state forum must appear on the record before the litigant is denied entry to the federal district court. For example, if a party files a civil rights suit in federal court challenging the constitutionality of a state statute and the Court abstains to permit the state courts to initially interpret the state act, the litigant may return to the federal forum to continue his attack after the state court ruling is made. See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).

It is clear the state criminal prosecutions can provide an appropriate forum for adjudication of claims grounded in the federal constitution. See Younger v. Harris, 401 U.S. 37 (1971) and Samuels v.

Mackell, 401 U.S. 66 (1971), noted in 85 Harv. L. Rev. 301 (1971). Faced with pending -- or threatened -- state prosecution for violation of a state or local statute, a litigant may elect to raise his constitutional contentions in the state trial and, if a conviction is entered, to pursue his challenge on appeal in the state courts. See Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973); cf., Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

Consequently, when the litigant has so elected, principles of res judicata or collateral estoppel, to the extent applicable to the factual setting, should limit subsequent relitigation of the constitutional claim, or the facts underlying it, in a federal civil rights suit. See Metros v. U.S. District Court, 441 F.2d 313, 316-18 (10th Cir. 1971); Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970); Goss v. State of Illinois, 312 F.2d 257 (7th Cir. 1963); Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973); Murray v. Oswald, 333 F. Supp. 490 (S.D.N.Y. 1971); 1B Moore, Federal Practice, ¶0.418[1](1965).

Moreover, if such an election is made,[3] the litigant's proper and only en-

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[3]If the litigant initially files a civil rights complaint in federal court challenging a state law while a state prosecution is pending against him under

try into the federal court system would be on petition for a writ of certiorari to the U.S. Supreme Court, 28 U.S.C. §§1257, 2101; see Lackawanna Police Benevolent Association v. Balen, 446 F. 2d 52 (2nd Cir. 1971)(per curiam); Russell v. Monroe, 351 F. Supp. 115, 118 (W.D.N.Y. 1972); or, if the litigant is in "custody," see Hensley v. Municipal Court, ___ U.S. ___, 41 U.S.L.W. 4513 (April 18, 1973), through a federal habeas corpus proceeding, 28 U.S.C. §2254, in which res judicata would not be a

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that law, the federal court -- absent a finding of bad faith prosecution -- would abstain in the interest of comity. Mitchum v. Foster, 407 U.S. 225 (1972); Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971). If the litigant then raises his defense in an effort to avoid conviction and -- following a conviction -- decides not to continue his challenge through the state appellate process, a federal civil rights suit might be appropriate. See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). The problem of election facing a litigant is carefully presented by Judge Merhige in Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973).

bar.[4] Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953).

The record of this case shows that plaintiffs elected to litigate their constitutional claim in the state courts and that the issues now presented herein were -- or should have been -- presented to the state courts.

At the June 13 hearing, plaintiff Lockshon testified as follows:

> "All I know is before the trial started there was somebody from some agency, and he said, "Let's drop the whole matter," and since I had begun this I said, "No, this I think is a constitutional thing. I have a right to give out leaflets. I want to go through with this thing."

Moreover, following the adverse determination in Criminal Court, plaintiffs appealed their convictions to the Appellate Term and sought review by the New York Court of Appeals; a petition for certiorari to the U.S. Supreme Court was not filed. The appellate brief filed by plaintiffs corresponds closely to the brief filed by plaintiffs simultaneously with their complaint herein; the issues presented for decision are essentially the same.

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[4]Findings made in a post-conviction relief proceeding, however, will be binding in a subsequent civil suit. See Rosenberg v. Martin, ___ F.2d ___, Docket No. 72-2262 (2d Cir. April 27, 1973); Williams

Allowing this suit to continue would sanction the type of repetitive litigation which is contrary to the policies underlying res judicata and to comity between federal and state courts. Even though the state determinations were made without formal opinion, this Court finds that plaintiffs have had full and sufficient opportunity to litigate their constitutional claim.

Plaintiffs argue that even if principles of res judicata are generally applicable to the type of situation presented herein, the judicial bar to their suit should not be imposed because the claims for relief in this suit and in the prior state proceedings are distinct. While, as a general rule, "the conclusive effect of res judicata is limited to the same cause of action," IB Moore, Federal Practice ¶0.410[1](1965), it is clear on the record of this case that plaintiffs both in the prior proseecings and in the present suit seek to render inoperative the effect of Rule 13. Repetitive litigation is not to be allowed simply because the claim bears a new garb. See Lackawanna Police Benevolent Association v. Balen, 466 F.2d 52 (2d Cir. 1971)(per curiam). Plaintiffs additionally contend that aspects of their claim were not raised before the state court. The aspects now cited as additional are inherent in the arguments presented to the state court and, in any event, res judicata precludes relitigation of any aspect of the claim.

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v. Halperin, 360 F. Supp. 554 (S.D.N.Y. 1973)(Pollack, J.).

Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927).

Since plaintiffs elected to pursue their challenge to the constitutionality of Section 13 in the state courts, the final determination entered by the state courts preclude further consideration[5] of the challenge by this Court, and accordingly, the complaint must be dismissed.

III. Other Contentions

In view of the determination made herein, defendants' alternative grounds for dismissal of the complaint do not require extensive comment. Defendants contend that no live case or controversy is presented, in part, because plaintiffs are not currently subject to a pending criminal prosecution. In view of Younger v. Harris, 401 U.S. 77 (1971) and Samuels v. Mackell, 401 U.S. 66 (1971), it is clear that pendency of a state prosecution -- which is a basis for federal abstention -- cannot be a prerequisite for a live grievance under 42 U.S.C. §1983. The Court finds that an adequate case and controversy is pleaded herein. See Pichler v. Jennings, 347 F. Supp. 1061 (S.D.N.Y. 1971) and cases discussed therein. De-

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[5]The Court considered an application for preliminary relief before ruling on the motion to dismiss the complaint, finding, inter alia, no probable success on the merits of the claim raised. Plaintiffs, in effect, have been accorded partial adjudication by this Court, in addition to their full day in Court in the state system.

fendants' reliance on Golden v. Zwickler, 394 U.S. 103 (1969), on this record, is misplaced.

Moreover, the complaint herein is sufficient to withstand a motion to dismiss on the grounds of failure to state a claim upon which relief may be granted.

The conclusive effect of res judicata is the ground on which the complaint should be and is dismissed, with costs.

SO ORDERED.

/s/ Milton Pollack
U.S. District Judge

July 25, 1973

NOV 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-524

WILLIAM THISTLETHWAITE,

Petitioner,

—against—

THE CITY OF NEW YORK, THE PARKS RECREATION AND CULTURAL AFFAIRS ADMINISTRATION and AUGUST HECKSCHER and RICHARD M. CLURMAN, as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

WILLIAM THISTLETHWAITE,

Petitioner,

—against—

THE CITY OF NEW YORK, THE PARKS RECREATION AND CULTURAL AFFAIRS ADMINISTRATION and AUGUST HECKSCHER and RICHARD M. CLURMAN, as former and present administrators, respectively, of the Parks, Recreation and Cultural Affairs Administration,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

This is an action brought under the Civil Rights Act seeking declaratory and injunctive relief with respect to a rule of the New York City Parks Recreation and Cul-

tural Affairs Administration requiring a permit for the distribution of literature in City parks. The District Court for the Southern District of New York (POLLACK, J.) dismissed the complaint on the ground that it was barred by *res judicata*. The Court of Appeals for the Second Circuit, one judge dissenting, affirmed on essentially the same ground, holding that prior state criminal proceedings involving the identical constitutional issue as that involved here collaterally estopped the petitioner from raising this issue again in a civil rights action. An application for rehearing en banc was denied.

Questions Presented

The petitioner (hereafter referred to as the plaintiff) was convicted in state criminal proceedings of distributing literature, in areas under the jurisdiction of the City's Parks, Recreation and Cultural Affairs Administration, without the permit required by the Administration's regulations. At his criminal trial and on appeal of his conviction, he challenged the permit requirement as violative of the First Amendment. In this civil rights action, he does not seek to overturn his conviction, but seeks a declaration that the permit requirement, as applied to him, violates the First Amendment.

1. Does the prior state adjudication collaterally estop plaintiff from challenging the permit requirement, as applied to him, as a violation of the First Amendment?

2. Assuming that collateral estoppel does not entirely preclude this litigation, does a nondiscriminatory permit requirement, which does not vest discretion in park officials to deny or revoke permits except for limited reasons unrelated to the curtailing of freedom of speech, violate the First Amendment?

Facts

(1)

The plaintiff and another individual, Sol Lockshon, who was a plaintiff below but is not a petitioner here, were convicted in New York criminal proceedings of distributing literature in areas under the jurisdiction of New York City's Parks, Recreation and Cultural Affairs Administration without the permit required by Section 13 of the Administration's Rules and Regulations (A5-A6).* In this civil rights action they did not collaterally attack their convictions, but sought declaratory and injunctive relief invalidating the permit requirement (A8).

Section 13 of the Administration's Rules and Regulations provides as follows (A14):

> "No person shall hold any meeting, perform any ceremony, make an address, exhibit or distribute any sign, placard, declaration or appeal of any description in any park or park-street, except by permit from Parks, Recreation and Cultural Affairs Administration. Upon application, the Administrator shall issue such permit unless: (1) the use for which the permit is sought would substantially interfere with park use and enjoyment by the public: (2) the location selected is not suitable because of special landscaping and planting: (3) the location is not suitable because it is a specialized area including but not limited to, a zoo, swimming pool, or skating rink; (4) the date and time requested have

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* Numbers in parentheses *preceded* by "A" refer to pages of the Joint Appendix in the Court of Appeals for the Second Circuit. Numbers *followed* by "A" refer to pages of the Appendix annexed to the Petition for Certiorari.

previously been allotted by permit. Whenever a permit is denied, alternative suitable locations and dates shall be offered to the applicant."

The plaintiffs also attacked, as part of their challenge to Section 13, Section 11 of the Administration's Rules and Regulations which states *inter alia* that "A permit may be granted upon such terms and conditions as the Administrator shall reasonably impose" (A13, A5, A36) and the following two statements which appear on permit application forms (A19, A5): "4. It is prohibited to distribute, place, post, display or cast about any pamphlets, handbills, placards, signs or any other appeals or advertising matter within any park or on any park street. No advertising of any kind is permitted on programs. * * * 9. The permit if granted is not transferable and is revocable at any time in the absolute discretion of the Commissioner."

(2)

The facts as to the state criminal proceedings are as follows:

On June 27, 1970, plaintiff Thistlethwaite was stopped from distributing political leaflets in Central Park, because he had no permit from the Administrator of the Parks, Recreation and Cultural Affairs Administration, and he was charged with a violation of Section 13 of the Administration's Rules and Regulations which requires a permit (A5-A6). A copy of the leaflet appears at page A20 of the Joint Appendix in the Court of Appeals. On April 17, 1971, Sol Lockshon, a plaintiff below but not a petitioner here, was similarly charged, for having distributed a political leaflet on a sidewalk at Central Park West (A6). Neither plaintiff had applied for a permit (A6).

The two plaintiffs were tried in a consolidated proceeding before the Criminal Court of the City of New York, New York County (LANE, J.), on January 13, 1972, were found guilty of violating Section 13, and were sentenced to a fine of $10.00 or two days in jail (A6).

At the state criminal trial the plaintiffs moved to dismiss the prosecution on the ground that Section 13, as applied to them, as sole distributors of political literature, was void as a violation of their First Amendment rights (A6). A copy of those portions of the transcript of the criminal trial which involve the plaintiffs' motions to dismiss were submitted by the defendants on the defendants' motion to dismiss the instant action and appear in the Joint Appendix in the Court of Appeals at pages A23-A32.

The plaintiffs' motions to dismiss in the state court were denied without opinion (A6, A31-A32). By order dated November 17, 1972, the Appellate Term of the New York State Supreme Court affirmed the judgments of the Criminal Court without opinion. On December 22, 1972, their applications for leave to appeal to the State Court of Appeals were denied (A6-A7).

(3)

Before answer, the defendants moved to dismiss the complaint on the grounds, *inter alia*, that the state criminal proceedings preclude relitigation in this action (A22-A32). The plaintiffs moved for a preliminary injunction (A33-A41). The transcript of an evidentiary hearing held on these motions appears in the Joint Appendix in the Court of Appeals at pages A42-A103.

At the hearing, plaintiff Lockshon testified that his lawyer had told him that, on the advice of the District Court,

he should seek a permit (A50-A51). Plaintiff Lockshon testified that he did obtain a permit and distributed leaflets pursuant to it (A49, A50, A58-A59).

Hillel Gedrich, an attorney in the counsel's office of the Parks Administration testified as to the reasons for the permit requirement (A68 *et seq.*). He noted that "we attempt to make some reasonable regulation of use of park property to deal with various competing interests on the part of the public" (A69). He testified that specialized uses must be protected, so that, for example, people are not allowed to distribute leaflets on a baseball field in the park (A70).

Gedrich noted the reasons why the permit issued to plaintiff Lockshon differed in certain respects from the application (A70-A74).

Gedrich also testified that permits for distributing literature are issued as a matter of course by the Parks Department (A74, A82). He noted (A74):

> "We try to ask applicants to use areas that we call forum areas, because we hope that the type of activity will be concentrated there and it will be a fairer distribution, as it were, of the competition for use of the parks. We have set aside areas for many special purposes and one of them we call forum areas which are, one, easier to clean up, and two, are designated as forum areas, hopefully to attract people who would be perhaps more interested in exchanging ideas rather than in sitting quietly or in playing baseball or in eating."

In response to questioning by the plaintiffs' counsel, Mr. Gedrich testified that he was familiar with the interpretation given to the regulations and to the permit application forms and permits (A80). He testified that statement num-

ber 4 on the application form (*ante*, p. 4) which says that it is prohibited to distribute matter in the parks is "interpreted to mean that no distribution of leaflets or other matter is permitted unless it's specifically permitted by the terms of the permit" (A81-A82). For example, if a permit is issued for a musical program in the park, leaflets cannot be handed out at the performance unless that is allowed by the permit (A82).

When asked about the statement on the application form (*ante*, p. 4) saying that the permit is revocable in the Commissioner's discretion, Mr. Gedrich noted that the exercise of such discretion is "really based on the fact that park land is inalienable, and we have had several of our past concession agreements and other permit agreements declared to be the equivalent of leases and therefore null and void; so that any time we give any kind of a permit or license or any kind of an agreement to use park property, it is always revocable at will by the Commissioner * * *" (A82-A83). He added (A83): "We, I think, are under a very strong obligation not to operate in an arbitrary or capricious manner and we don't. When there is any danger of specific problems arising we make our regulations specific enough so that the discretion is removed." Thus, he testified, the Commissioner can grant permits on terms that are reasonable and does not exercise absolute discretion (A83-A84). Plaintiff Lockshon's permit was, to his knowledge, not revoked (A85). If a permit is revoked, it is for a specific cause (A85-A86). One would be "failure to abide by the terms of the permit in some significant way" (A86). Also, where there is a permit of substantial duration, it may have to be revoked, for example, to reach a sewer beneath the permit area (A86).

Opinions Below

District Court Opinion
362 F. Supp. 88

In granting the motion to dismiss, the District Court wrote an extensive opinion (A106-A119). The Court described the prior state court proceedings and noted that the plaintiffs had not sought review by the United States Supreme Court or collateral relief through habeas corpus (A107-A108). It then reviewed the proceedings in this action and its denial of preliminary relief (A108).

The Court went on to discuss the principles of res judicata applicable to this case: that state court judgments must be accorded full faith and credit by federal courts; that state as well as federal judges are charged with preserving and applying the federal Constitution; and, accordingly, that state court rulings cannot be collaterally challenged in federal civil rights actions (A109-A111). The Court also noted the various important policies behind the principle of res judicata, including comity and the avoidance of duplicative litigation (A112-A113). The Court went on to find that these principles apply to criminal prosecutions, which can provide an appropriate forum for the adjudication of constitutional rights (A114).

The Court concluded that "the convicted defendants ought not to be permitted to maintain a civil rights suit seeking a declaration of constitutional invalidity and an injunction against enforcement of the questioned local rule, when they have affirmatively raised the unconstitutionality of the local rule in the criminal proceeding and pursued that challenge on appeal through the state courts" (A110, A114-A116). The Court added that to allow this suit to continue "would sanction the type of repetitive litigation which is contrary to the policies underlying *res*

judicata and to comity between federal and state courts" (A116-A117).

The Court rejected the other grounds for the motion to dismiss, which were the absence of a case or controversy and the failure to state a claim upon which relief may be granted (A118-A119).

Court of Appeals Majority Opinion
497 F. 2d 339

The Court of Appeals reviewed the prior proceedings and the District Court's decision (2A-4A). It then discussed the various arguments made by the plaintiffs and concluded that "in the current context we find these arguments unpersuasive" (4A).

The Court rejected the plaintiffs' argument "that the present cause of action is different from the prior criminal suit because it attacks the whole system of permit dispensing and seeks prospective relief against its enforcement." In so doing, it said (4A):

> ". . . it is quite clear that the gist of the current suit is that the regulations are unconstitutional; it is also clear that this question was at issue and determined against the appellants in the state action. A perusal of the briefs submitted to the Appellate Term cannot fail to convince that the whole regulatory scheme was assailed, on its face and as applied to appellants. Memorandum of Appellants in Support of Certification to the Court of Appeals at 3; Brief for Appellants in the Appellate Term, First Department at 9-10. We are thus convinced that the assault was broadly based and broadly considered."

The Court also rejected the claim that the prospective nature of the relief sought necessarily precluded estoppel, saying (4A-5A):

> "In appellants' view there has been merely a determination of law based on 'expired' facts and the prior decision should be considered here solely on the basis of *stare decisis*—persuasive perhaps but certainly not conclusive. However, it was in fact determined by a court of competent jurisdiction that it was proper for the Parks Administration to require distributors of political literature who wish to distribute their pamphlets in a park to obtain a permit. If this determination, applying the regulation in question to facts identical to those presently alleged, is seen to bind appellants, they certainly cannot succeed on the present course of litigation."

The Court then went on to discuss the plaintiffs' alternative argument that, even if collateral estoppel would otherwise apply, the policy underlying the Civil Rights Act would best be served by refusing to apply collateral estoppel here. This argument was also rejected, the Court saying (5A):

> "While we recognize the particular nature of the Civil Rights Act and the intent of Congress embodied therein, we are not of the opinion that the trial judge applied the doctrines of res judicata 'mechanically' to the facts of this case; further we do not read in the act any intent to foster career litigants. *Lackawanna Police Benevolent Association* v. *Balen*, 446 F. 2d 52 (2d Cir. 1971); *see also Rosenberg* v. *Martin*, 478 F. 2d 520, 525 (2d Cir. 1973); Friendly, Federal Jurisdiction: A General View 101 n. 113."

Finally, the Court addressed the argument that there can be no estoppel because the plaintiff had not elected the state forum (6A). As to this argument, the Court first rejected the contention that an election of the state tribunal is required before collateral estoppel can apply (6A). However, it noted "in passing", first, that, "At the very least, it seems clear that both [plaintiffs] had determined to pursue the New York action to a conclusion on constitutional grounds" and, second, that "habeas corpus is generally available in situations similar to the one at hand" (6A-7A).

The Court did not refer to the notation in our brief that, under the rule laid down in *Monroe* v. *Pape*, 365 U. S. 167, 187-192 (1961), this civil rights action does not lie against the defendant City of New York or the defendant Parks, Recreation and Cultural Affairs Administration.

Court of Appeals Dissenting Opinion

The dissenting Circuit Judge, while acknowledging that the doctrines of res judicata and collateral estoppel have been applied in civil rights actions, was of the opinion that collateral estoppel does not apply here because the present suit presents different issues from those raised in the earlier, criminal suit (9A-11A). In addition, the dissenting judge expressed disapproval of the application of collateral estoppel to a criminal conviction "so as to defeat a civil rights action seeking a declaratory judgment as to future enforcement of a statute," particularly where First Amendment rights are allegedly involved (12A-13a).

POINT I

The plaintiffs fully litigated the very constitutional issues they urge here in prior state criminal proceedings. Consequently, they are estopped from relitigating those issues in this civil rights action.

(1)

The first reason urged by the plaintiff (Pet., p. 9) as to why certiorari should be granted is that this case is similar to another case pending before this Court, namely, *Ellis* v. *Dyson*, 358 F. Supp. 262 (N.D. Tex., 1973), affd. without opinion 475 F. 2d 1402 (5th Cir., 1973), cert. gr. 416 U.S. 954 (1974). We submit that the plaintiff's reliance on *Ellis* is entirely misplaced, because the doctrine of collateral estoppel upon which we, and the courts below relied, has played no part at all in the *Ellis* case. In *Ellis*, the Court dismissed a civil rights complaint seeking declaratory and injunctive relief from an anti-loitering ordinance of the City of Dallas. The complaint stated that the plaintiffs had been arrested and charged with violation of the ordinance, that they had unsuccessfully sought a writ of prohibition from the Texas Court of Criminal Appeals on the grounds the ordinance was unconstitutional and that they were later convicted after entering pleas of nolo contendere (358 F. Supp. at p. 264). In the civil rights action, the plaintiffs sought a declaration that the ordinance was unconstitutional and, in addition, certain collateral relief with respect to their convictions, such as expungement of their arrest records (p. 264, fn. 3). The defendants moved to dismiss for lack of jurisdiction and failure to state a claim. Alternatively, they asked the Court in its discretion to obstain from exercising jurisdiction (p. 263). The Court, without reaching plaintiffs' motion for summary judg-

ment or defendants' motion for abstention, granted defendants' motion to dismiss (p. 264).

The District Court's opinion in *Ellis* indicates that neither the defendants, nor the Court on its own, ever raised the doctrines of res judicata and collateral estoppel. Nor does it appear in *Ellis* that there was any effort to establish the basis for a collateral estoppel, by presenting, as is required, and as was done in the case at bar, the record of the criminal trial to show that the issues allegedly subject to an estoppel were in fact fully and fairly litigated there.

The District Court in *Ellis* dismissed the complaint on a ground entirely separate and distinct from that at issue here. Following various Fifth Circuit decisions, it held that the rule of *Younger* v. *Harris*, 401 U.S. 1 (1971), should be extended to cases where state criminal prosecutions are not pending, but merely threatened. Consequendy, it held that, in the absence of bad faith prosecution, harassment or other unusual circumstances, the complaint must be dismissed (p. 265). That holding appears to be in direct conflict with this Court's recent decision in *Steffel* v. *Thompson*, 415 U.S. 452 (1974). The District Court in *Ellis* also relied on the plaintiffs' failure to exhaust state appeal processes after their convictions (pp. 265-266). As indicated in the summary of the case appearing in 42 U.S.L.W. 3105, the exhaustion issue and the issue respecting threatened state prosecutions were the only ones presented by the certiorari petition. Thus, the *Ellis* case does not present the issue involved here.

We also note that the plaintiff's reliance on cases such as *Steffel, supra, Younger, supra, O'Shea* v. *Littleton*, 414 U.S. 488 (1974), and *Mitchum* v. *Foster*, 407 U.S. 225 (1972), is similarly misplaced. None of those cases involved the applicability of the doctrines of res judicata

and collateral estoppel. Nor are the general principles of federalism and comity and the need for a case or controversy, as discussed in those cases, in conflict in any way with the application to this case of established rules of res judicata and collateral estoppel.

(2)

The Full Faith and Credit Clause of the United States Constitution requires that state court judgments be given the same res judicata effect in federal courts, as in state courts, even where federal constitutional questions are involved. *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Gart* v. *Cole*, 263 F. 2d 244 (2nd Cir., 1958), cert. den. 359 U.S. 978 (1959). The plaintiff does not avoid the application of the principles of res judicata and collateral estoppel merely because he sues under the federal Civil Rights Act. *Johnson* v. *Dept. of Water and Power*, 450 F. 2d 294 (9th Cir., 1971); *Lackawanna Police Benevolent Association* v. *Balen*, 446 F. 2d 52 (2nd Cir., 1971); *PI Enterprises* v. *Cataldo*, 457 F. 2d 1012 (1st Cir., 1972). See *Francisco Enterprises, Inc.* v. *Kirby*, 482 F. 2d 481, 485 (9th Cir., 1973), cert. den. 415 U.S. 916 (1974); *Paul* v. *Dade County, Florida*, 419 F. 2d 10 (5th Cir., 1969), cert. den. 397 U.S. 1065 (1970); *Shadid* v. *Oklahoma City*, 494 F. 2d 1267, 1268 (10th Cir., 1974). In the *Lackawanna* case the plaintiff in the state courts had unsuccessfully challenged the constitutionality of a New York statutory provision governing the number of hours worked by police officers. The Court, in a per curiam decision, held that the plaintiff's federal suit, brought under the Civil Rights Act, should have been dismissed on the ground that the state court judgment was res judicata. The Court said:

> "Having lost in the state courts, plaintiff's remedy was to seek review by the Supreme Court. The

> Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry. Howe v. Brouse, 422 F. 2d 347 (8 Cir. 1970); Scott v. California Supreme Court, 426 F. 2d 300 (9 Cir. 1970)."

But Cf. Lombard v. *Board of Education,* 502 F. 2d 631 (2nd Cir., 1974), in which the Court refused to apply res judicata on the ground that the plaintiff had not specifically raised his procedural due process claim in the prior state proceeding.

In *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973), this Court, citing cases in various Circuits, stated that *"res judicata* has been held to be fully applicable to a civil rights action brought under §1983."

The plaintiff in this action challenges the requirement that he, as a sole distributor of political literature, obtain a permit before such distribution in parks. In defending criminal charges brought against him in the state courts for distributing literature without a permit, he moved to dismiss the charges on the very constitutional grounds which are the basis of the instant action, to wit, that Section 13's permit requirement impairs his First Amendment right to freedom of speech (A23-A32).

When the motion was denied and he was found guilty, he appealed to the Appellate Term of the New York State Supreme Court. When that court affirmed the judgment of the Criminal Court, he unsuccessfully sought leave to appeal to the New York Court of Appeals (A6-A7). Any doubt as to what was litigated in the criminal case is removed by an examination of the plaintiff's briefs in the state courts. They make clear that the constitutional issues litigated in the state courts are identical to those being urged here. As stated by the Court below (4A):

> ". . . it is quite clear that the gist of the current suit is that the regulations are unconstitutional;

it is also clear that this question was at issue and determined against the appellants in the State action. A perusal of the briefs submitted to the Appellate Term cannot fail to convince that the whole regulatory scheme was assailed, on its face and as applied to appellants. Memorandum of Appellants in Support of Certification to the Court of Appeals at 3; Brief for Appellants in the Appellate Term, First Department at 9-10. We are thus convinced that the assault was broadly based and broadly considered."

The plaintiff made no effort to obtain review in the United States Supreme Court.

(3)

That the prior judgment on which we rely was made in a criminal case does not make the rules of res judicata and collateral estoppel inapplicable. It is established that a criminal conviction may work an estoppel in a subsequent civil proceeding as to questions distinctly put in issue and directly determined. *Emich Motors Corp.* v. *General Motors,* 340 U.S. 558, 568-569 (1951). Absent some overriding principle of public policy, there is no reason why a litigant, once given a full and fair opportunity to present his case, should be allowed to relitigate a matter previously decided against his position in a criminal proceeding. *Palma* v. *Powers,* 295 F. Supp. 924, 933-936 (N.D.Ill., 1969).

For examples of cases where parties were collaterally estopped from urging a constitutional issue in a federal civil rights suit by a prior adverse determination of that issue in a state criminal proceeding, see *Goss* v. *State of Illinois,* 312 F. 2d 257, 259 (7th Cir., 1963), cited by

this Court in *Preiser* v. *Rodriguez, supra,* 411 U.S. at p. 497; *Murray* v. *Oswald,* 333 F. Supp. 490 (S.D.N.Y., 1971); *Palma* v. *Powers,* 295 F. Supp. 924 (N.D.Ill., 1969); *Pinkus* v. *Arneberg,* 258 F. Supp. 996, 1004 (C.D. Cal., 1966).

The dilemma suggested by the plaintiff (Pet., p. 15) of state criminal defendants refraining from asserting constitutional defenses in order to preserve their rights to raise constitutional issues in the federal courts vanishes on examination. A state criminal defendant can seek review in this Court to vindicate his federally protected rights (a review which the plaintiff in this case chose not to seek) and thus need not refrain from raising constitutional issues in order to obtain ultimate federal court review for his claims. In addition, even after having raised his constitutional claims fully in the state courts, a criminal defendant ordinarily may seek federal habeas corpus relief without any bar by way of res judicata.

The claim that the application of an estoppel in this case would destroy the Civil Rights Act as to any matter which is subject to a state criminal statute (Pet., pp. 13-14) is incorrect. As the plaintiff recognizes, the estoppel worked by his state conviction applies only to him and not to any other individuals who may choose to sue in federal court. This plaintiff has fully litigated the constitutional issue as it applies to him, and thus there is nothing anomalous about his being estopped from relitigating that issue while others remain free to challenge the regulation.

(4)

The plaintiff's suggestion that an estoppel cannot be imposed here because he did not "elect" to litigate the issue first in the state courts but was compelled to do so by virtue of his criminal prosecution (Pet., pp. 14-15)

contradicts the cases cited (*ante*, pp. 16-17). In addition, the plaintiff misapprehends both the nature of res judicata and collateral estoppel and the significance of the case upon which he relies.

The primary principles underlying res judicata and collateral estoppel are the need for finality of judgments and the desirability of avoiding unnecessary relitigation of issues that have already been fully litigated. The applicability of these principles is not dependent upon a further requirement that the party against whom they are being applied elected the forum in which the judgment was rendered. What is critical is that the party against whom a collateral estoppel is imposed has fully litigated the identical matter which he is being precluded from relitigating. Here that test is met.

The plaintiff's reliance (Pet., p. 14) on *England* v. *Medical Examiners*, 375 U.S. 411 (1964), is misplaced. In *England* the Court held that where a party is remitted to the state courts by an abstention order of a federal court, the party is entitled to elect whether to litigate his federal claims in the state courts or to reserve those claims for the federal court. As the Court noted (375 U.S. at pp. 415, 416): "Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems'" and abstention does not "involve the abdication of federal jurisdiction, but only the postponement of its exercise". The Court found that, since res judicata would bar federal litigation of issues litigated in the state courts where a party properly invoked federal jurisdiction and the Court then abstained from acting in order to allow the state courts to resolve issues of state law, fairness required giving the plaintiff an opportunity to elect whether to litigate his federal claims in the state or federal courts. The *England* decision is entirely consistent with our posi-

tion. Nowhere in the Court's opinion is there any suggestion that res judicata does not apply to one who was a defendant in the earlier proceeding and who thus did not "elect" the forum whose judgment bars a second litigation.

Moreover, even under the plaintiff's theory of election, the crucial issue would be, not whether he elected the forum, but what issues he elected to litigate. Here, the plaintiff elected to raise in the state courts the very constitutional issues he seeks to litigate again. As the Court below found, an election of the state tribunal is not required to hold the present action barred by collateral estoppel; however, the Court noted, if any inquiry were to be made into the question of election, then "At the very least, it seems clear that both [of the plaintiffs] had determined to pursue the New York action to a conclusion on constitutional grounds" (6A-7A).

(5)

We fully agree that collateral estoppel applies only to those issues fully litigated and actually determined. The plaintiff cannot seriously dispute that the issue as to the constitutionality of the requirement that he obtain a permit before distributing political literature in the parks was fully litigated and actually determined in the state courts. His claim was that he was entitled under the First Amendment to distribute such literature in City parks without being required to obtain a permit. In this case the facts alleged, as to his being a sole distributor of political literature, are identical, and his claim, that the permit requirement as applied to him is invalid under the First Amendment, is identical. There can be no doubt that, under the rules of collateral estoppel, he is barred from relitigating this issue.

On this petition the plaintiff does not urge that there remain any other litigable issues. However, he claims that no estoppel can be applied because, unlike in the criminal suit, "he seeks prospective relief, for future threatened injury" (Pet., p. 16). We disagree, as did the Court below. The facts alleged are identical. The plaintiff is a sole distributor of political literature who seeks to distribute literature in the parks without a permit. If, at some future time, he wishes to raise a claim resting on a different pattern of facts, he must allege those facts and the claim to which he believes they give rise. He cannot avoid estoppel in this proceeding as to those facts and issues which have been litigated, merely because different facts and different claims may arise later.

POINT II

Even if relief is not barred under principles of collateral estoppel, the complaint was properly dismissed for failure to state a claim upon which relief may be granted. The requirement of a permit does not violate the First Amendment since it does not give discretion to park officials to prohibit distribution of non-commercial matter in the parks. Its only restrictions relate to interference with other park uses, completely unsuitable locations such as swimming pools, or conflicts with uses similar to that for which the permit is sought.

At the outset we note that we claim no right to bar absolutely the freedom to speak or distribute leaflets in public parks or streets. And we agree that no permit to engage in such activities may be withheld for reasons relating to the nature of the speech or the speaker or the nature of the printed material or those who distri-

bute it or on the basis of any other ground which would be unreasonable in light of its restraint of free speech.

This Court has repeatedly upheld the principle that municipalities may impose reasonable restrictions on the time, place and manner of the exercise of First Amendment rights. See *California* v. *La Rue*, 409 U.S. 109 (1972), at p. 117, text and fn. 4, and cases cited therein. *Cf. Police Department* v. *Moseley*, 408 U.S. 92 (1972), where this Court struck down a city ordinance prohibiting all picketing of a school involved in a labor dispute. The Court reaffirmed the principle that the government may impose reasonable "time, place and manner" restrictions on expressive conduct (at p. 98), but found that "the central problem" with the ordinance was its description of permissible picketing in terms of subject matter (at p. 95). No such problem exists here.

The view of the Court with respect to public parks is well summarized in *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953). There the Court, in upholding a licensing requirement for religious meetings in a public park, said (pp. 405-407):

> "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a *non sequitur* to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated to the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that

> preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion. When considering specifically the regulation of the use of public parks, this Court has taken the same position [Citing *Hague* v. *C.I.O.*, 307 U.S. 496, 515-516 (1939)]."

The Court distinguished such cases as *Kunz* v. *New York*, 340 U.S. 290 (1951) and *Saia* v. *New York*, 334 U.S. 558 (1948), on the ground that, in those cases, "the ordinances were held invalid, not because they regulated the use of the parks for meeting and instruction but because they left complete discretion to refuse the use in the hands of officials" (pp. 406-407). Again, no such problem exists here.

Section 13, at issue here, is a nondiscriminatory regulation, requiring a permit for such things as meetings, addresses and distributions in the parks, which vests only strictly limited discretion in park officials. Section 13 specifies that a permit "shall" be issued unless certain strong and specific reasons exist for denial. These reasons are, for example, that the use for which the permit is sought would substantially interfere with park use and enjoyment by others, that the site sought is in a specialized area such as a zoo or swimming area and that the date and time have previously been allotted by another permit. Moreover, Section 13 provides:

> "When a permit is denied alternative suitable locations and dates shall be offered to the applicant."

The Section is, therefore, constitutional on its face. In addition, there was evidence at the hearing to confirm that permits are issued as a matter of course and, in accord-

ance with its language, only so as to deal reasonably with the various competing uses of the parks (A68-A74).

In *People* v. *Nahman*, 298 N.Y. 95 (1948), the New York Court of Appeals upheld a Parks Department permit requirement which on its face was more restrictive than the present regulation. On the basis of a statement by the Parks Commissioner as to the manner in which the regulation was being applied, the Court treated the regulation as though it were essentially identical with the regulation presently in effect. The Court said (pp. 102-103):

> "The regulation, we repeat, confers no power to suppress the publication of facts or opinions. On the contrary, as we have tried to demonstrate, it is in essence a nondiscriminatory provision which has for its sole objective the safety, comfort and convenience of the people of the City in their appropriate uses of its public parks. To our minds the regulation—so read—is a reasonable measure of local control which affects civil liberties only in an allowable minor degree."

The regulation involved in the *Nahman* case was again upheld on the same grounds in *People* v. *Hass*, 299 N.Y. 190 (1949), app. dism. 338 U.S. 803 (1949). There, also, the conviction was for failure to obtain a permit. The appeal to this Court was dismissed for "want of a substantial federal question." Such a dismissal is a determination on the merits. See *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311, 315 (1902); *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959) (memo of Justice Brennan); Speech of Justice Harlan, *Record of Assn. of Bar of City of New York*, Vol. 13, pp. 541, 596 (1958).

CONCLUSION

The petition for a writ of certiorari should be denied.

November 25, 1974.

Respectfully submitted,

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